

discussions of cases that involve not only traditional intellectual property rights such as trademarks but also goodwill and know-how. After these illustrations, Oke reasserts the importance of synchronization using an intertextuality approach.

Chapter 5 addresses the scope of the fair and equitable treatment (FET) standard and examines how tribunals have treated the FET standard in relation to foreign investments and intellectual property rights. FET clauses are included in almost all BITs but are interpreted differently based on the exact terms of the BIT. Oke again cites the dispute between Philip Morris and Uruguay when discussing the treatment of intellectual property and the FET standard. The language of the Switzerland-Uruguay BIT provides that each “Contracting Party shall ensure fair and equitable treatment with its territory of investments of the investors of the other Contracting Party.” The tribunal looked to both the VCLT and customary international law to interpret the FET clause. Although there was a disagreement between the arbitrators regarding Philip Morris’ allegations of violation of the FET due to contradictory rulings by judicial bodies in Uruguay, the majority of arbitrators were not swayed by this argument as the standard for violating a FET clause is high. After examining the cases, Oke acknowledges that drawing general conclusions from cases involving the FET standard is difficult due to variations in FET clauses used in BITs but concludes that the ambiguous nature of the FET standard means they pose a threat to investment disputes generally, not just to disputes involving intellectual property rights. Again, an intertextual approach is proposed to solve this ambiguity.

In Chapter 6, Oke considers both direct and indirect expropriation of intellectual property rights through judicial or regulatory action. The chapter primarily focuses on regulatory action and Oke examines how tribunals have applied the three major tests for expropriation, namely the sole effects test, the police powers test, and the proportionality test. Tribunals use these tests to distinguish between legitimate regulation and regulatory expropriation. Oke revisits the dispute between Philip Morris and Uruguay and examines the dispute under all three tests of regulatory expropriation. To close, Oke again advocates that tribunals should engage in intertextual analysis to solve the regulatory expropriation claims in these types of disputes.

While the discussion of using BITs to protect intellectual property is fascinating, I am not convinced of the necessity of using intertextuality. VCLT Article 31(3)(c) clearly provides for broad usage of other rules of international law as part of the general rules of interpretation. Oke’s initial defense of intertextuality is cursory and does not fully counter critiques such as that of Judge Posner. The dispute between Philip Morris and Uruguay is discussed in multiple chapters and could have been a more obvious framing device for the Oke’s argument. Overall, the book’s strength is its examination of the interplay between international investment law and international intellectual property rights rather than its focus on intertextuality.

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Kritika: Essays on Intellectual Property: Volume 5. Edited by Gustavo Ghidini, Hanns Ullrich and Peter Drahos. Cheltenham, UK: Northampton, MA. Edward Elgar Publishing, 2021.

For this volume, the editors asked the authors to write a personal reflection based on their scholarly experience on events and processes that significantly affected their perception of trends in the field of intellectual property law. (pg. xiii) The result is eight essays from academics on distinct areas of intellectual property law from various parts of the world, which provides an excellent history of the changes to intellectual property law in the past five decades. All the authors note how intellectual property law was a small specialty area of the law just a short time ago. The essays are written in a range of styles; some are written as an analytical retrospective of personal experience and others are in an academic interest to understand unexpected developments. (pg. xiii)

Niklas Bruun considers employee inventions. He points out the changing of society as people no longer work for one company their whole life. As a result, individual employees need to be recognized for their creations. Bruun examines how Human Rights laws provide a bases in international law to recognize employee’s interest.

Thomas Cottier discusses how intellectual property law is traditionally a horizontal relationship with the government enforcing rights between two people. However, international intellectual property law requires a vertical

relationship with the government through public law. At its core intellectual property law amounts to market regulation by the government. International agreements define how governments will treat foreign interests effecting intellectual property rights.

Annette Kur describes the relationship between trademark, unfair competition principles and consumer protections. Trademark protections have expanded, especially in the EU, since the 1980s. She argues for a more balanced approach that supports competition while still protecting the proprietor-consumer relationship.

Hector L. MacQueen delves into the changes to copyright law because of the digital revolution. These changes included the introduction of the idea of ‘temporary’ or ‘transient’ copying as infringement and changing approaches to the concept of fair dealing exceptions to rights. (pg. 84)

Dianne Nicol examines patents and their effects on scientific research in areas like human genes. In industries with rapid evolution patents can create monopolies that hinder innovation. She argues for changes like compulsory licensing and experimental use that will favor collaboration.

Sam Ricketson looks at intellectual property rights relating to trade. He feels it is important to look not just at the ‘black letter’ law but also to get perspective from history on the context and background. (pg. 126)

Jayashree Watal contemplates drug patents and its effects on developing countries, particularly India. While big multilateral treaties have created a durable foundation for intellectual property protections, through his role as a negotiator in the TRIPS agreement and other treaties, Watal thinks in areas like access to medicine bilateral agreements will be the norm.

Zhou Lin reviews copyright law in China related to artist. He argues that a good piece of legislation requires freedom of information, openness, and participation. (pg. 198) Through Lin’s look at resale rights he concludes that a legal provision or system that has been successful abroad may not necessarily be beneficial for China. (pg. 199)

This book is best suited for people that have a background in international intellectual property law. All the authors talk about international treaties and case law with little or no descriptions, sometimes just using acronyms. For a novice on the subject, it can require some background reading. The essays do have plenty of footnotes providing citations and some details. There is also an index in this volume which may be helpful to individuals looking for a certain topic as the essays cover broad subject matters.

The essays do provide a good historical overview of international intellectual property law, pointing out the challenges with any agreements of such a large scale (many different points of view and level of power) in a rapidly changing area of society. The technological issues of the 1970s are quite different from today, but the law changes slowly. As Nicol notes in her essay, intellectual property rights can encourage development by the holder but can stifle further innovation by others (pg. 101).

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